SUPREME COURT, U. S.

No. ~~1723~~

Supreme Court of the United States

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

OCTOBER TERM, 1971.

70-181

ADOLPH BERKE,

Petitioner,

v.

LEHIGH MARINE DISPOSAL CORP.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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TABLE OF CONTENTS

	Page
Petition For Writ of Certiorari to The United States Court of Appeals For the Second Circuit	1
The Opinion of the Courts Below	2
Jurisdiction	2
Questions Presented For Review	2
Statutes Involved	3
Statement of the Case	4
Reasons for Allowance of the Writ	5
Conclusion	8

Cases Cited

Boat Dagny, Inc. v. Todd (1 Cir.) 155, 224 F2d 208, 1955 AMC 2083	6
Dixon v. U.S. (2 Cir.) 1955, 219 F2d 10	6
Grillea v. U.S., (2 Cir) 232 F2d 919,	6
Jacob v. City of New York, 315 U.S. 752, 757, 758	6
Lavender v. Kurn, 327 U.S. 645, 652, 653	7
Louisiana and Arkansas R. Co. v. Johnson (5 Cir.) 1954, 214 F2d 290	6

Mahnich v. Southern S/S Co., 321 U.S. 119 7

Mason v. Lynch Bros. Co. 1956, 4 Cir., 228 F2d 709, 1956 AMC 394 6

Schlichter v. Port Arthur Towing Co., 288 F 2d 801 (Fifth Circuit) Cer. denied 368 U.S. 838 (1961) 5

Schulz v. Pennsylvania R. Co., 350 U.S. 523 (1956) 13

Spero v. S/S Argodon, DCED Va., 1957, 150 F. Supp. 1, 1957 AMC 1056 6

Waldron v. Moore-McCormack Lines, 386 U.S. 724 6

Walker v. Lykes Bros. SS Co. (2 Cir.) 1962, 193 F 2d 772, 1952 AMC 269 6

Statutes

Federal Employers. Liability Act, 55 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. 51; 45 U.S.C.A. 51..... 3

Jones Act, 38 Stat. 1185, as amended, 41 Stat. 1007, 46 U.S.C. 688, 46 U.S.C.A. 688. 3

28 U.S.C. Sections 1254(1) and 2101 (c) 2

APPENDICES

Decision of United States District Court for the Southern District of New York Delivered Orally by Judge Charles M. Metzner 9

Opinion of the United States Court of Appeals for the Second Circuit 10

Decision Denying Petition for Rehearing 16

Decision Denying Petition for Rehearing In Banc 17

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971.

ADOLPH BERKE,

Petitioner,

v.

LEHIGH MARINE DISPOSAL CORP.,

Respondent.

Petition For Writ of Certiorari to The United States Court of Appeals For the Second Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the Southern District of New York entered in favor of the respondent after the trial judge directed a verdict in favor of defendant at the conclusion of plaintiff's proof.

The Opinion of the Courts Below.

The decision of the United States District Court for the Southern District of New York by Judge Charles M. Metzner was delivered orally and is appended hereto (app. pp. 9); the opinion of the United States Court of Appeals for the Second Cricuit by Judge Waterman is appended hereto (app. pp. 10). A petition for rehearing and/or rehearing *in banc* to the United States Court of Appeals was denied on February 18, 1971 and is appended hereto (App. pp. 16-17).

Jurisdiction

The decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was decided and entered December 24, 1970 and is appended hereto (App. pp. 10).

Petition for rehearing was denied and entered on February 18, 1971 and is appended hereto. (16)

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 U.S.C. Sections 1254(1) and 2101(c).

Questions Presented For Review

In a Jones Act–General Maritime Law Claim:

1. Must the plaintiff prove that he personally could not have rectified an unseaworthy condition before that condition could give rise to liability on the part of the vessel where a jury question was present as to causation?

2. Is the plaintiff wrongly deprived of his constitutional right to a jury trial where the District Court dismissed the action for failure of plaintiff's proof as to causation and the Court of Appeals rejected the District Court's reason and then affirmed the decision after imposing a new and heretofore unknown burden on the Plaintiff?

3. May a District Court direct a verdict against a plaintiff on the issue of maintenance and cure payments where documents in evidence indicate that after being discharged from the hospital, the plaintiff's sputum cultures indicated for the first time positive tubercule bacilli for which the plaintiff was declared not fit for duty, was readmitted and then placed on an anti-tuberculosis regimen as an outpatient for approximately one year, which resulted in arresting the tuberculosis infection?

Statutes Involved

The Jones Act, 38 Stat. 1185, as amended, 41 Stat. 1007, 46 U.S.C. 688, 46 U.S.C.A. 688. The Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. 51:45 U.S.C.A. 51.

The pertinent part of the Jones act, 46 U.S.C.A. 688, reads:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;***"

The pertinent part of the Federal Employers' Liability Act, 45 U.S.C.A. 51, provides that the employer shall be liable:

"*** for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, ***."

Statement of the Case

The United States District Court below acquired jurisdiction as petitioner's suit is based on the Jones Act, 46 U.S.C.A. 688. The pretrial order charged that respondent's scow was unseaworthy in that the deck was not reasonably safe and that the scow was not equipped with proper handlines and life jackets. The complaint alleged that the defendant failed to furnish proper equipment, failed to enforce safe rules of seamanship and failed to warn plaintiff of the dangers and perils.

Because of his mental deterioration, plaintiff did not testify at the trial. His deposition was offered, but excluded by the trial judge on the ground that there was insufficient extrinsic evidence of his incompetence. The trial court refused to voir dire the plaintiff to ascertain this for himself.

At the end of petitioner's case, upon motion of the defendant, the Court dismissed the complaint on the grounds of the "failure of the plaintiff to show any proximate cause between any alleged unseaworthiness on the part of the vessel and the fact that the plaintiff was found in the water." The United States Court of Appeals for the Second Circuit affirmed, not on the ground set forth by the District Court[1] but rather on the grounds that "plaintiff failed to produce any evidence that the "S-3 was not equipped with hand lines and cleaning equipment which Berke could have used if he were so inclined."

Briefly stated, the facts of the accident are as follows:

Defendant, LEHIGH MARINE DISPOSAL CORP. owned and operated the barge S-3, and employed the plaintiff, A. B., as sole bargee on board. Plaintiff was hired by the trip, and was not a permanent employee of defendant.

Berke's job was to handle the tow line and operate the

1 and in fact stated "there was sufficient evidence to permit the jury to infer that he fell overboard because of the slippery condition of the deck and lack of handrails."

dumping equipment at sea. The barge was constructed in such a way that there was a walkway around the perimeter of the barge, three feet wide. This walkway allowed access to the dumping mechanisms at the different holds. It is customary for barges of this type to have hand lines or life lines along the walkway for the bargee to hold as he goes to the dumping controls. The S-3 was not equipped with such safety lines and the walkways were covered with "muck and dirt" on this particular voyage.

The barge was dumped at night, and sometime after daylight, while the tow was returning to port, Berke was seen working at the front end of the scow.

Approximately one hour later Berke was seen in the water by the men on the tug.

He was rescued and taken to the Marine Hospital at Staten Island. The accident occurred on March 6. When pulled from the water Berke was blue.

Petitioner was a patient at the hospital for approximately one month, and then discharged fit for duty. While a patient in the hospital, sputum cultures were obtained. Following the growth of the cultures and Berke's discharge, the sputum proved to be positive and he was readmitted and treated both as an inpatient and outpatient for an extended period of time.

No maintenance was ever paid to the petitioner.

Reasons for Allowance of the Writ

The Decision of the Court of Appeals for the Second Circuit imposes a new and extraordinary burden in Jones Act cases, which is in conflict, on the basis of law and fact, with the decisions of this Court and other United States Courts of Appeal. If left standing, it will adversely effect the Jones Act rights of seamen.

Relying on *Schlichter v. Port Arthur Towing Co.*, 288 F 2d 801 (Fifth Circuit) cert. denied 368 U.S. 838 (1961), the Court

of Appeals fashioned a new rule of burden of proof in seamen's cases, holding that the plaintiff should have produced evidence that the S-3 was without equipment which plaintiff could have used to remedy an unseaworthy condition before the question of causation between the unseaworthiness and the accident could be considered by the triers of the facts.

The Court of Appeals applied the holding in *Schlichter* to the facts in *Berke* which, if left undisturbed, flies in the face of *Grillea v. U.S.*, (2 Cir) 232 F2d 919, and *Mahnich v. Southern S/S Co.*, 321 U.S. 119 and *Waldron v. Moore-McCormack Lines*, 386 U.S. 724.

In *Schlichter*, the only claim of unseaworthiness rested on the inaccessability of life saving equipment which might have saved plaintiff's life. Schlichter kept the equipment in a locked place and had the key in his own pocket. The Court held that Schlichter's independent act of keeping the life saving equipment locked up sealed his (Schlichter's) fate and insulated the owners from liability. *Schlichter* relied on *Walker v. Lykes Bros.* SS Co. (2 Cir.) 1952, 193 F 2d 772, 1952 AMC 269. Footnote 3 in *Schlichter* at page 805 indicates that:

> "This case (Walker, supra) and the so-called 'primary duty rule' has been subject to considerable criticism, see *Boat Dagny, Inc. v. Todd* (1 Cir.) 155, 224 F2d 208, 1955 AMC 2083 which in turn rests largely upon the analysis made in *Louisiana and Arkansas R. Co. v. Johnson* (5 Cir.) 1954, 214 F2d 290, and its application has been severely limited, and *Mason v. Lynch Bros. Co.* 1956, 4 Cir., 228 F2d 709, 1956 AMC 394; *Spero v. S/S Argodon*, DCED Va., 1957, 150 F. Supp. 1, 1957 AMC 1056."

In its own circuit, the *Walker* case has been expressly distinguished, *Dixon v. U.S.* (2 Cir.) 1955, 219 F 2d 10. Which analyzed the principle as follows: (at page 16)

> "Those cases (*Walker, Great Northern*, etc.) are only instances of the firmly established rule that an employee may not recover against his employer for injuries

occasioned by his own neglect of some independent duty arising out of the employer-employee relationship. Their result turns really not upon any question of 'proximate cause,' 'assumption of risk' or 'contributory negligence,' but rather upon the employer's independent right to recover against the employee for the *non-performance* of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work. Such cases are quite inapposite here. Dixon was not guilty of any breach of duty to his employer." (emphasis ours)

The Court, in enlarging the holding in *Schlichter* to the facts in *Berke* imposes on every Jones Act seaman the burden of showing his freedom from the obligation and opportunity of rectifying the unseaworthiness before the vessel is liable for injuries resulting from that unseaworthy condition.

This holding is contra *Mahnich*, which held that for a vessel to be seaworthy, the equipment which is needed to attain that condition must be positioned and placed where it is normally required and expected to be; the mere fact that there was sound rope on board which might have been used, affords no excuse to the shipowner for failure to provide safe staging which failed and injured plaintiff.

Waldron v. Moore-McCormack Lines, 386 U.S. 724, held the vessel liable for unseaworthiness where inadequate manpower caused the unseaworthiness regardless of the fact that additional manpower was available on board but not employed. Indeed, actionable liability may arise even where the unseaworthiness arises from the conduct of the plaintiff himself. *Grillea v. U.S.*, (2 Cir.) 232 F 2d 919.

The Court of Appeals, in affirming the District Court's decision on grounds heretofore unknown, deprived petitioner of his Constitutional right to a jury trial, which is an integral and vital part of his remedy under the Jones Act. *Jacob v. City of New York*, 315 U.S. 752, 757, 758; *Lavender v. Kurn*, 327 U.S. 645, 652, 653.

POINT III.

There was sufficient evidence from which the jury could have found that plaintiff's tubercular condition was caused by his immersion, and that he should be entitled to maintenance for his periods of out-patient care for this condition.

In considering the question of maintenance, the Court, in its opinion, did not even mention plaintiff's tuberculosis. However, the evidence shows that while in the hospital following his immersion, a sputum culture was taken (147a); that when this culture was returned following plaintiff's discharge from the hospital, it was found to be positive for tuberculosis bacilli (153a); that plaintiff received additional in-patient and out-patient care because of this condition. Certainly, he was entitled to have a jury determine whether or not the proof justified an award for maintenance.

Conclusion

For the above reasons, a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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APPENDIX

Decision of United States District Court for the Southern District of New York Delivered Orally by Judge Charles M. Metzner

The Court: Mr. Foreman, and ladies and gentlemen of the jury.

As you heard, the plaintiff has rested, and in your absence we have had an argument on questions of law, and after hearing those arguments I have dismissed the complaint for failure of the plaintiff to show any proximate cause between any alleged unseaworthiness on the part of the vessel or any negligence on the part of the vessel, and the fact that the plaintiff was found in the water.

Absent such proof, the plaintiff has failed to sustain his prima facie case, and consequently I have dismissed the complaint.

You may return to the jury room downstairs, Room 113.

Thank you very much for your attention.

(Jury excused.)

Mr. Matthews: Your Honor, I wonder if I might only have the plaintiff's deposition marked as an exhibit.

The Court: Certainly.

Mr. Matthews: Thank you, your Honor.

(Plaintiff's Exhibit 2 marked for identification.)

Mr. Lynch: In light of your Honor's ruling, I now move to dismiss the third-party complaint as against my client, No. 17 Battery Place Corporation, No. 1, the owner of the tugboat.

The Court: The motion is granted.

Case closed.

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 170—September Term, 1970.

(Argued November 10, 1970 Decided December 24, 1970.)

Docket No. 33819

ADOLPH BERKE,

Plaintiff-Appellant,

—v.—

LEHIGH MARINE DISPOSAL CORP.,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and ANDERSON, *Circuit Judges.*

Appeal by plaintiff from a judgment, United States District Court for the Southern District of New York, Metzner, *J.*, entered on dismissal of the complaint at the close of plaintiff's case on the ground that there was insufficient evidence to go to the jury on the issues of negligence, unseaworthiness, and maintenance and cure. Affirmed.

PAUL C. MATTHEWS, JOHN F. X. McKIERNAN,
New York City, *for Plaintiff-Appellant.*

WILLIAM F. LARKIN, SCHAFFNER & D'ONOFRIO,
New York City, *for Defendant-Appellee.*

WATERMAN, *Circuit Judge:*

Plaintiff-appellant Berke commenced this action against his employer to recover damages resulting from personal injuries which he suffered when he fell overboard from the scow S-3 in Greater New York Harbor on March 7, 1965. His first cause of action was premised on the alleged unseaworthiness of the scow and, under the Jones Act, on the alleged negligence of the employer. His second cause of action was for maintenance and cure. Seeking indemnity, the employer impleaded the owner of the tug which was towing the S-3 at the time of the accident. At the end of plaintiff's case the trial judge granted defendant's motion to dismiss the complaint on the ground that there was insufficient evidence to take the case to the jury on either of the two counts. The propriety of that decision is the subject of this appeal.[1] We affirm the dismissal order.

The following sketch of the facts is undisputed. At about midnight on March 6, 1965, the scow S-3, owned and operated by the defendant-appellee, was berthed under the Brooklyn Bridge where it had been loaded with debris and was being prepared to be towed to sea by a tug operated by the third-party defendant. The scow was approximately 200 feet in length and 40 feet in width and contained four pockets in which the debris was heaped in cone-shaped piles. Around the pockets and along the perimeter of the scow ran a walkway approximately three feet in width. Plaintiff Berke was the scow's captain and was the sole crew member of the S-3.

When the tug arrived to take the S-3 out to sea, Berke and one Mullin, a deckhand on the tug and an old friend of Berke, made the necessary tie-up. After preliminary maneuvering in the harbor, the tug towed the S-3, secured by a line 400 to 500 feet long, to sea. Out at sea, the tug captain signaled Berke to open the doors at the bottom of the pockets in order to dump the debris into the ocean. Berke responded and, after the dumping, the tug with the scow in tow headed back to New York. After dawn, Berke was observed by Mullin scraping the No. 1 pocket

1 The third-party complaint was also dismissed but the propriety of that dismissal is not before us on this appeal.

with a long pole. Approximately fifteen minutes later, as the tug was approaching the Verrazano Bridge, the tug slowed in order to shorten the tow lines so as to pull the S-3 alongside for better maneuverability in the harbor. A signal was given for Berke to help in changing the ropes but he did not appear. Therefore, the S-3 was pulled in immediately astern of the tug, and Mullin was sent on board to find Berke and to handle the ropes in bringing the scow alongside. After the manipulating of the ropes had been accomplished and after a search of the scow for Berke had proved fruitless, Mullin observed something, which turned out to be Berke, splashing in the water some distance astern of the scow. Berke was rescued and taken to the Marine Hospital on Staten Island, where he was treated for penumonia and congestive heart failure. He was discharged on April 2, 1965, with the notation "Fit for duty." Since that time, Berke, then 65, has allegedly suffered marked physical

Plaintiff contends in his first cause of action that he fell overboard as a result of an alleged lack of equipment to clean the muddy debris off the deck of the scow and the alleged absence of a hand line around the perimeter of the boat. However, apparently because of his deteriorated mental state, Berke, though present in court during the trial, did not testify and Mullin was plaintiff's sole witness on the issues of negligence and unseaworthiness. In support of plaintiff's claims, Mullin testified that there was no hand line in place on the S-3 when he was helping Berke tie up under the Brooklyn Bridge on March 6, 1965, or on previous occasions; that at these times he had not seen the customary equipment for cleaning off the deck; and that he himself had slipped on the deck of the S-3 during Berke's rescue. However, the testimony as to the lack of cleaning equipment was stricken because Mullin had traversed only part of the S-3's perimeter that night and because he had not been looking for the equipment on any of the occasions mentioned. On cross-examination Mullin admitted that it was customary for hand lines to be removed during loading and that

he was not surprised when he did not see them in place when the tug was made fast to the barge under the Brooklyn Bridge.

The trial judge's exclusion of Mullin's testimony relative to cleaning equipment was proper inasmuch as, under the circumstances, Mullin's testimony amounted to no more than a statement that he did not know whether such equipment was on the S-3. Nor does Mullin's testimony as to the condition of the scow at the time of Berke's rescue supply the evidence needed to show the alleged lack of cleaning equipment and hand lines. As Berke was the sole crew member of the S-3, an absence of hand lines from the deck perimeter and a slippery condition of the deck evidenced Berke's own failure to perform his duties as scow captain if the proper equipment were in fact available to be used by him. While we agree with the plaintiff that there was sufficient evidence to permit the jury to infer that he fell overboard because of the slippery condition of the deck and the lack of hand lines, see *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523 (1956), plaintiff failed to produce any evidence that the S-3 was not equipped with hand lines and cleaning equipment which Berke could have used if he were so inclined. In *Schulz* there was evidence of the defendant's negligence and the Court there was concerned solely with whether that negligence was a cause of the drowning. Here, though, counsel, through more thorough discovery, could have obtained further information as to the presence or absence of proper equipment on the S-3. He did not do so, and without this added proof the jury, having been left to pure speculation on the issue of negligence and unseaworthiness, could never have reached the issue of causation. See *Schlichter v. Port Arthur Towing Co.*, 288 F.2d 801, 804-805 (5 Cir.), *cert. denied*, 368 U.S. 828 (1961). Although the trial judge dismissed the action for failure of plaintiff's proof as to causation, we can and do affirm on the separate ground[2] that there was

2 It is well settled that an appellate court may affirm a correct result reached below even though an erroneous reason for the decision was given by the lower court. See, e.g., *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); *S & S Logging Co. v. Barker*, 366 F.2d 617, 623 (9 Cir. 1966).

insufficient proof to go to the jury on the question of negligence and unseaworthiness.

Plaintiff also complains that the trial judge made an adverse inference from Berke's deposition, offered in lieu of witness-stand testimony, should have been admitted into evidence. However, on the grounds we have above stated, a directed verdict would have been proper even without an adverse inference. Counsel offered no competent testimony to prove that Berke was incompetent to testify at the trial and, without such a foundation, Berke's deposition was inadmissible. Rule 32(a)(3) [formerly Rule 26(d)(3)], F. R. Civ. P. In any event, had it been admitted, the deposition, in which Berke narrated circumstances, uncorroborated and incapable of being corroborated, concerning vessels in the vicinity of the S-3 at the time of the accident, would have been of little value to plaintiff's case for this imaginative narration would seem to demonstrate that Berke apparently was not fully competent even at the time of the deposition.

On the issue of maintenance and cure, one Dr. Reichman, who had twice examined Berke solely for the purposes of trial, testified on the basis of these two examinations and Berke's hospital record. On cross-examination he admitted that all of Berke's ailments listed in the hospital reports for the hospitalization immediately following the accident, except for his aggravated bronchitis, pre-existed the accident or were cured upon Berke's discharge from the Marine Hospital on April 2, 1965. As to the aggravated bronchitis, he testified that further treatment would only relieve the symptoms but would not permanently improve the condition. On this testimony there was no evidence on which the jury could have inferred that

Berke had not reached maximum cure[3] upon the April 2 discharge from the Marine Hospital and the directed verdict on this count was properly entered.

Affirmed.

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3 A seaman is not entitled to "cure" past the point at which his condition cannot be further improved. *Farrell v. United States*, 336 U.S. 511 (1949); *Fitzgerald v. United States Lines Company*, 374 U.S. 16, 19 n. 7 (1963); *Travis v. Motor Vessel Rapids Citiees*, 315 F.2d 805, 810-811 (8 Cir. 1963); *Desmond v. United States*, 217 F.2d 948, 950 (2 Cir. 1954), cert. denied, 349 U.S. 911 (1955); *Stewart v. Waterman S.S. Corp.*, 288 F. Supp. 629, 634 (E.D. La. 1968), aff'd, 409 F.2d 1045 (5 Cir. 1969), cert. denied, 397 U.S. 1011 (1970). We point out that we are aware that the Third Circuit has recently expanded the definition of "cure" to include those situations where, as here, the plaintiff could receive out-patient palliative treatment for a permanent condition, *Neff v. Dravo Corp.*, 407 F.2d 228 (3 Cir. 1969), and that we have not overlooked that decision.

Decision Denying Petition for Rehearing

33819
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ADOLPH BERKE,

Plaintiff-Appellant,

v.

LEHIGH MARINE DISPOSAL CORP.,

Defendant and Third-Party
Plaintiff-Appellee,

17 BATTERY PLACE NO. 1 CORP., SUCCESSORS IN INTEREST TO DAIZEL TOWING COMPANY, INC.,

Third-Party
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. Edward Lumbard
Sterry R. Waterman
Robert P. Anderson
Circuit Judges

February 18, 1971

Decision Denying Petition for Reheaing In Banc

33819

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ADOLPH BERKE,

Plaintiff-Appellant,

v.

LEHIGH MARINE DISPOSAL CORP.,

Defendant and Third-Party
Plaintiff-Appellee,

17 BATTERY PLACE NO. 1 CORP., SUCCESSORS IN INTEREST TO DAIZEL TOWING COMPANY, INC.,

Third-Party
Defendant-Appellee.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

February 18, 1971

SUPREME COURT, U. S.
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JUN 12 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

70-181

No. ~~1723~~

ADOLPH BERKE,

Petitioner,

—against—

LEHIGH MARINE DISPOSAL CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
ISSUES	1
FACTS ON LIABILITY	2
FACTS ON DAMAGES	6
POINT I—There is no justification for a review of the decision of the Court of Appeals in this case on the issues of negligence and unseaworthiness	7
POINT II—There is no justification for a review of the decision of the Court of Appeals on the issues of maintenance and cure	10
CONCLUSION	12

Cases Cited

Great Northern v. Wiles, 240 U. S. 444	9
Manhat v. United States, 220 F. 2d 143, 146 cert. denied 349 US 966	8
Schlichter v. Port Arthur Towing Company, 288 F 2d 801, cert. denied 368 U. S. 838	9
Schulz v. Pennsylvania Ry. Co., 350 US 523	8
Walker v. Lykes Bros. SS Co., 193 F 2d 772, 774, 775	9

IN THE

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No.

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—against—

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Issues

1. Whether the Court of Appeals correctly held that the plaintiff had not sustained his burden of producing sufficient proof that the condition of the barge from which he fell constituted unseaworthiness or was the result of negligence chargeable to his employer, the owner of the vessel.

2. Whether the determination of no proof of unseaworthiness or negligence rendered moot a decision on causation.

3. Whether the clear, undisputed and definitive evidence required a directed verdict on the issue of maintenance and cure.

Facts on Liability

Adolph Berke was the captain and the only member of the crew of the dump scow S-3 (46a).* At about midnight (95a) before the accident, the subject scow was loaded by a process involving the dumping of building debris from above into its pockets (42a, 97a). When the holds were completely filled the deck of the scow was either a little below (100a, 101a) or a little above (98a) the one foot height of the tug's deck to which it was attached (101a) and the load stood in a cone shape five or six feet above the top of the pockets (50a, 96a). The operation of loading normally involved some stray material landing on the walking deck (42a) which had a width of three feet and extended around the perimeter of the entire vessel (50a). It was admitted in the plaintiff's case that the cable type handline running around the outside of the deck of the scow (40a-41a) customarily was dismantled and removed during this type of a loading process to avoid damage so that such handrails were not expected to be seen in place that night just after loading (97a-98a).

The plaintiff's witness testified that when he went aboard this scow on the night before the accident, he only walked over one part of the deck—not the entire deck (45a). Since he did not look for either a broom or

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* References are to pages in the Appendix.

a squeegee aboard the S-3 at that time, he could not tell the Court whether it was equipped with those implements or not (44a-45a). He testified that a squeegee or broom was acceptable equipment for cleaning down the deck (42a-43a) and that it was the duty of the barge captain to brush the debris overboard off the deck so that it could be walked upon (43a-44a).

Plaintiff's witness, the tug's "mud man", attested to the fact that when he spoke to Mr. Berke that night he was in good healh, in full possession of his faculties and performed his functions in a seamanlike manner (47a, 48a, 49a).

Later that night the scow was observed being emptied by the plaintiff in a seamanlike manner (51a, 101a-102a). He was again seen working on board the barge after daybreak (102a). It was within an hour thereafter (102a-106a) that Adolph Berke was discovered to be missing from the vessel (52a-54a). He was found in the water some couple of hundred feet away (54a, 111a).

Joseph Mullin, the tug "mud man", was the only fact witness to the circumstances preceding and subsequent to Adolph Berke's fall from the scow. Only the plaintiff himself could recount the facts of his accident. The petitioner's brief states, on page 4, that because of his mental condition at the time of trial, plaintiff did not testify. The plaintiff's deposition was offered after he had rested his case but it was excluded by the trial judge on the ground that there was insufficient evidence of his incompetence. It is apparent that the petitioner is now claiming that the plaintiff, although incompetent to testify at the time of trial, was lucid when he testified in his deposition. That transcript of the deposition was marked Plaintiff's Exhibit 2 for identification and was presented to the Trial Court. The description of the accident given by the plaintiff therein is as follows: